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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

William R. Lux,
Petitioner,

v.

Frank Angel,
Respondent.

PETITIONER'S BRIEF IN REPLY TO RESPONDENT'S BRIEF-IN-OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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III. PETITIONER'S REPLY TO RESPONDENT'S STATEMENT OF THE CASE

Respondent's Statement of the Case consists of a summary of the evidence supporting his position that Petitioner was terminated, not because of his speech on October 15, 1973, but because of perceived problems in the performance of his duties. This issue of causation was defined in *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274 (1977), and is referred to in the Petition for Writ of Certiorari as "the Mt. Healthy issue." (Petition at 11, n. 6).

This case is the appropriate vehicle to address the Questions Presented For Review, as stated in the Petition, because there is no Mt. Healthy issue to obfuscate the resolution of the fundamental First Amendment issues presented here. By its verdict, the jury resolved the Mt. Healthy issue in favor of the Petitioner, *i.e.*, it found that Petitioner was indeed terminated for exercising his constitutional right of free speech as opposed to the reasons advanced by the Respondent. The New Mexico Court of Appeals did not disturb that finding in favor of Petitioner or even address it. Rather, the court assumed that plaintiff's performance was at least adequate and that his performance furnished no justification for termination, but found that the speech of October 15, 1973, was unprotected conduct for which Petitioner could properly be terminated. Therefore, this Court need not consider the Mt. Healthy issue which was not even passed on by the lower court. That issue has no place in the context of this Petition.

In addition to the fact that the Mt. Healthy issue was improperly raised by the Respondent, Respondent takes the liberty of expounding his view of the evidence in the light most favorable to his position. Even if the issue were appropriate here, the standard for reviewing the failure of the trial court to direct a verdict for Respondent is whether there was any evidence or inference from which the jury could have arrived at its verdict in favor of Petitioner, viewing all the evidence in favor of Petitioner. (Petition at 11, n. 7). In the event the Court should deem it appropriate to review the evidence on this issue, Petitioner has summarized the evidence on the Mt. Healthy issue in the Petition at pages 8 through 10. That evidence clearly supports the jury's verdict on this issue.

There is one representation of fact made in Respondent's Brief-In-Opposition (pp. 5, 13) to which Petitioner must respond. Respondent suggests that Petitioner was directed to give the October 15, 1973, speech "as a spokesman for the university, the administration and the man he attacked." *Id.* at 13. Aside from the mischaracterization of the speech as an "attack" on anyone, there is no evidence whatsoever that Petitioner was directed to act as the "spokesman" for anyone or anything other than for himself and his own ideas. He was directed to speak to the Board of Regents and the President and to give his own views on "what had been happening in the university in the previous months." (2 X 362). At trial, Respondent testified that Petitioner "had every right to speak on whatever subject he wanted to, or criticize me or do whatever he wanted to." (9 X 1859). Respondent's current position is not only unsupported by the evidence but contradicted by his sworn testimony.

IV. PETITIONER'S REPLY TO RESPONDENT'S REASONS FOR REFUSAL OF THE WRIT

A. This Case Presents the Ideal Context for Addressing and Resolving the Questions Presented for Review.

Respondent's first argument is that the Court should not address these issues in the context of this case because Petitioner was terminated from his administrative position rather than from his teaching position. Respondent's characterization to the effect that Petitioner "was employed, and was acting purely in his capacity as" an administrator (Respondent's Brief-In-Opposition, pp. 12-13) is not supported by the record. During the 1973-1974 school year, Petitioner was employed as "Assistant Academic Dean (Director of Title III) Associate Professor of History" (Plaintiff's Exhibit 41). It is not uncommon for faculty of institutions of higher learning to be employed in more than one capacity. While the particular position or positions one holds is not irrelevant to the free speech issue, each case must be examined on its own facts to apply the proper standard. There is no black-and-white demarcation between teachers and administrators to justify different standards in each case. Indeed, the lower courts have attempted to apply either the standard as defined in *Pickering v. Board of Education*, 391 U.S. 563 (1968), or in *Tinker v. Des Moines Independent Community School District*, 393

U.S. 503 (1969), or both, to school teachers,[1] school administrators,[2] persons holding dual positions as teachers and administrators,[3] university security personnel,[4] a psychiatrist at a state hospital,[5] an assistant county treasurer,[6] an employee of a federal program,[7] and an administrative assistant of a state manpower agency,[8] just to name a few.

The reason for granting the Petition is that the standard applicable to the free speech rights of faculty, whether teachers or administrators, has never been clearly defined by the Court, notwithstanding the decisions in *Pickering* and *Tinker*, resulting in the application of various standards by the lower courts, as shown by the decision of the lower court in this case. Thus, the necessity for granting this Petition in this case is not lessened by the particular position or positions the Petitioner held at the time he gave the speech.

B. CONFLICTS AMONG THE LOWER COURTS HAVE ARISEN IN THE ABSENCE OF A DEFINITIVE DECISION BY THIS COURT ON FUNDAMENTAL PRINCIPLES IN THIS AREA.

Respondent's argument on this point serves to illustrate and support Petitioner's position rather than defeat it. Respondent urges that the "genius of *Pickering*" lay in the Court's "determin[ation] not to lay down any general standards against which all teacher or other government employee statements could be measured." (Respondent's Brief-In-Opposition, p. 16). Apparently, Respondent feels that the "genius of *Pickering*" is that it set not even general standards but left the issue of free speech open to subjective determination on a case-by-case basis. Consider the following two statements by Respondent (Brief-In-Opposition, p. 16), nearly in sequence:

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[1] *Adamian v. Lombardi*, 608 F.2d 1224 (9th Cir. 1979); *Hastings v. Bonner*, 578 F.2d 136 (5th Cir. 1978).

[2] *Washington v. Board of Education*, 498 F.2d 11 (7th Cir. 1974); *Hostrop v. Board of Junior College District No. 515*, 471 F.2d 488 (7th Cir. 1972), *cert. denied*, 411 U.S. 967 (1973).

[3] *D'Andrea v. Adams*, 626 F.2d 469 (5th Cir. 1980).

[4] *Williams v. Board of Regents*, 629 F.2d 993 (5th Cir. 1980), *cert. denied*, __ U.S. __, 49 U.S.L.W. 3910 (1981).

[5] *Downing v. Williams*, 624 F.2d 612 (5th Cir. 1980).

[6] *Van Ooteghem v. Gray*, 628 F.2d 488 (5th Cir. 1980).

[7] *Porter v. Califano*, 592 F.2d 770 (5th Cir. 1979).

[8] *Yoggerst v. Stewart*, 623 F.2d 35 (7th Cir. 1980).

> [I]t is difficult to imagine that the court [sic] would allow minimal or immaterial interferences to allow curtailment of First Amendment Rights in such a situation. . . . It is not difficult to imagine entirely plausible scenarios where teacher First Amendment activities could serve as proper grounds of dismissal, even in the absence of evidence of material disruption of school activities.

Respondent apparently suggests that the proper standard lies somewhere between demonstrating a "minimal or immaterial interference" with school activities and a "material disruption of school activities." Yet Respondent cannot identify such a standard or supply any authority for it. The lower court went even further by finding Petitioner's conduct to be unprotected without finding any evidence of even minimal interference with school activities. Both Respondent and the lower court reflect examples, albeit extreme, of the exodus from the basic First Amendment principles such that no objective or identifiable standards are left.

Respondent does not recognize the *Tinker* case as providing any guidance for the conduct of faculty on the grounds that students must be distinguished from teachers. Respondent simply ignores the language from the *Tinker* opinion (quoted in the Petition, p. 19) outlining the First Amendment rights of *teachers and students*. Respondent also chooses to ignore the statement in the Petition (p. 21), supported with citations, to the effect that a probable majority of the lower courts apply the *Tinker* "material and substantial disruption" standard to employee cases generally and teacher cases specifically. Petitioner stands on the discussion in the Petition demonstrating the conflict among the lower courts on this issue.

As recently as June 8, 1981, Justice Rehnquist recognized a conflict among the lower courts on "the so-called *Pickering* defenses" in a case involving the termination of a university security officer. In *Williams v. Board of Regents*, 629 F.2d 993 (5th Cir. 1980), the court held that evidence of the *Pickering* defenses was properly excluded because it viewed the evidence as presenting no factual issues for the jury to decide. The defendant sought a Writ of Certiorari to review that issue, among others, but the Court denied the petition. *Saye v. Williams*, __U.S. __, 49 U.S.L.W. 3910 (1981). Justice Rehnquist dissented, citing an apparent inconsistency among the lower courts in applying the *Pickering* defenses to public employees.

Id. Because this Petition presents a more concrete and more common context for the resolution of this conflict, the Court should seize the opportunity presented by this Petition and should elucidate the proper interpretation of its 1968 decision in *Pickering* as well as its 1969 decision in *Tinker.*

C. THE OPINION OF THE NEW MEXICO COURT OF APPEALS WAS NOT PROPERLY DECIDED.

Respondent argues that the Opinion of the lower court employed "perhaps too artful language" and was "perhaps not clearly articulated" (Respondent's Brief-In-Opposition, pp. 19, 21), but that the case was correctly decided. Petitioner submits that the basis for the decision of the lower court was, as it said, because Petitioner's speech "did not serve to foster rational discourse, exchange of ideas, and meaningful discussion about a matter of legitimate public interest, and it is these functions that 'free speech' protections are intended to foster." (Petition, p. A13). For the reasons stated in the Petition, the lower court applied the wrong standard for free speech protection in this case.

Respondent's reliance on the "fighting words" doctrine is grossly misplaced. Respondent is certainly not suggesting that, as a result of the speech, he was inclined to "breach the peace" by assaulting the Petitioner in some manner and that, therefore, the conduct was unprotected. If Respondent is suggesting that the speech presented a "clear and present danger of riot, disorder...or other immediate threat to public safety, peace, or order," *Feiner v. New York*, 340 U.S. 315, 320 (1951), there is simply no evidence to support such a contention. No disorder resulted from the speech; the university subsequently responded to the speech by releasing the impounded funds and implementing the Title III program. Petitioner was later terminated for giving the speech.

D. THERE ARE NO "NON-CONSTITUTIONAL" BASES FOR THE DECISION BELOW.

This case lacks any non-constitutional issues. The case went to trial on three constitutional issues: a first amendment issue, a claim that Petitioner was deprived of liberty with due process of law, and an equal protection issue – all under the Constitution of the United States.

Respondent asks the Court to deny the Petition because he should have prevailed on the Mt. Healthy issue. Again, the point is that Petitioner prevailed on the Mt. Healthy issue at the trial level and the New Mexico Court of Appeals did not reach it.

V. CONCLUSION

Petitioner submits that the issue is not *whether* the Court should clarify the proper standard defining the extent of a faculty member's right of free speech, but simply *when* it should do so. As demonstrated in the Petition, in the twelve years since the *Pickering* and *Tinker* decisions were announced, this issue has been left to a highly subjective case-by-case determination so that what were relatively general guidelines in the first instance have become even less helpful by varied and inconsistent application.

Petitioner is not asking the Court to decide all future cases in this area. However, the Court should, at least, decide or confirm that a faculty member's expressive conduct is constitutionally protected unless it causes or imminently threatens to cause some interference with or disruption of school activities. At least, the Court should decide or confirm that any such interference or disruption must be substantial or material. Furthermore, the Court should decide or confirm that the interference or disruption must be related to valid institutional objectives as opposed to a purely personal adverse reaction such as "the discomfort and unpleasantness that always accompany an unpopular viewpoint." *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 509 (1969).

While there are undoubtedly other such guidelines the Court could well choose to address, if it did no more than decide these fundamental issues, it would thereby establish or re-establish a working framework for individual conduct and for resolution of disputed issues in this vital area. In the absence of any action by this Court, the decision of the lower courts can reasonably be expected to continue to radiate in numerous directions citing the *Pickering* and *Tinker* decisions simply as touchstones from which to depart.

This case presents the timely and proper occasion to re-establish the focus required by the First Amendment in this vital area because the facts are clear, the issues are concretely framed by those facts, and the decision of the lower court seriously jeopardizes this Court's prior holdings more than any such decision to date. Unless this petition is granted, the chilling effect of decisions such as that of the lower court will most certainly continue to intimidate faculty from their honest and important expressions of opinion on public issues.

Now is the time to provide those "sensitive tools which clearly inform teachers what is being proscribed." *Keyishian v. Board of Regents*, 385 U.S. 589, 604 (1967).

Respectfully submitted,

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